No. 95-719

Supreme Court, U.S.
FILED
DEC 4
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

FRANCIS A. MONTBACH
Counsel of Record
BIGHAM ENGLAR JONES
& HOUSTON
14 Wall Street
New York, New York 10005
(212) 732-4646

Attorneys for Respondent

Of Counsel

DAVID L. FIOL
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181

16pp

STATEMENT PURSUANT TO RULE 29.6

Respondent, The Center for Humanities, Inc., certifies that the following are its corporate parent, subsidiaries and/or affiliates:

Guidance Associates
Science & Mankind
Parents Magazine Films
Pathescope Educational Media
Vocational Media Associates
AutoVideo Productions

TABLE OF CONTENTS

	PAGE
Statement Pursuant to Rule 29.6	i
Table of Contents	ii
Table of Authorities	iii
Opinions Below	1
Factual Statement of the Case	2
Erroneous Comments in Petitioner's Brief	3
Reasons for Denying the Writ	4
I. THE SECOND CIRCUIT CORRECTLY HELD THAT THE JURY'S VERDICT WAS EXCESSIVE	4
II. APPELLATE REVIEW OF JURY VERDICTS FOR EXCESSIVENESS IS PROPER AND NECESSARY	6
III. JUSTICE WAS SERVED BY THE DECISION BELOW AND THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE ISSUES RAISED BY PETITIONER	7
Conclusion	11

TABLE OF AUTHORITIES

Cases	PAGE
Brooktree Corp. v. Advanced Micro Devices, Inc., 977 F.2d 1555 (Fed. Cir. 1992)	8
Clark v. Taylor, 710 F.2d 4 (1st Cir., 1983)	6
Consorti v. Armstrong World Industries, Inc., 65 F.3d 781 (2nd. Cir. 1995)	6
Cunningham v. Overland, 804 F.2d 1066 (8th Cir. 1986)	8
Ferren v. Richards Manufacturing Co., 733 F.2d 526 (8th Cir. 1984)	5
Green v. Francis, 705 F.2d 846 (6th Cir. 1983)	6
Hogan v. Bangor and Aroostook R.R. Co., 61 F.3d 1034 (5th Cir. 1995)	8
Honda Motor Co., Ltd. v. Oberg, __ U.S. __, 114 S. Ct. 2331 (1994)	6
Los Angeles Memorial Coliseum Comm'n v. National Football League, 791 F.2d 1356, 1360 (9th Cir.), *cert. denied*, 484 U.S. 826 (1987)	8
Marchant v. Dayton Tire & Rubber Co., 836 F.2d 695 (1st Cir. 1988)	7
Martell v. Boardwalk Enterprises, Inc., 748 F.2d 740 (2nd Cir. 1984)	5
Meyers v. Cincinnati, 14 F.3d 1115 (6th Cir. 1994)	8
Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corporation, 65 F.3d 1113 (4th Cir. 1995)	8

PAGE

Neyer v. United States, 845 F.2d 641 (6th Cir. 1988).. 8

Osburn v. Anchor Laboratories, Inc., 825 F.2d 908 (5th Cir., 1987), cert. denied, sub. nom. *Rachelle Laboratories, Inc. v. Osburn*, 485 U.S. 1009, 108 S. Ct. 1476 (1988)..... 5

Seidman v. American Airlines, Inc., 923 F.2d 1134 (5th Cir. 1991).....5, 6

Sockwell v. Phelps, 20 F.3d 187 (5th Cir. 1994)..... 8

Trevino v. United States, 804 F.2d 1512 (9th Cir. 1986), *cert. denied*, 484 U.S. 816, 108 S. Ct. 70 (1987)..... 6

Trytko v. Hubbell, Inc., 28 F.3d 715 (7th Cir. 1995)... 8

Velazquez v. Figueroa-Gomez, 996 F.2d 425 (1st Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 553 (1993) .. 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-719

WILLIAM GASPERINI,

Petitioner,

—v.—

THE CENTER FOR HUMANITIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT

Respondent, The Center for Humanities, Inc., respectfully requests that this Court deny the Petition for a Writ of Certiorari herein.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is published at 66 F.3d 427 (2d. Cir. 1995).

FACTUAL STATEMENT OF THE CASE

(I) THE FACTS

Petitioner, William Gasperini, now a journalist for CBS Radio News (3a), started his journalism career in 1984 as a free-lance print and radio journalist in Central America (3a). While there he took photographs, some of which he occasionally sold to the print media, earning, in the decade between 1984 and 1993, a total of approximately $10,000, an average of $1,000 per year, with almost 40% of those earnings coming in one year (5a). He admittedly did not earn his living with his camera (5a), and by his own testimony had no plans to market his photographs of Central America. His only other plans for these photographs was to use them in a book he intended to write about Central America, but the book has neither been written nor sold and the Circuit Court found no evidence that it was likely that such a book would generate significant income (6a).

Respondent is in the business of producing educational videos for school children (3a). In 1990, Respondent borrowed 300 of Mr. Gasperini's slides of Central America for use in an educational videotape. According to the contract between Petitioner and Respondent, the only compensation for the use of the slides was to be a royalty payment of fifteen percent of the cash receipts from the sale of the videotape (3a). Not only were these royalties paid, but an additional payment of $3,500.00 was made to Mr. Gasperini due to lower than expected sales of the videotapes. When the Center attempted to return the slides, they could not be found, despite an extensive search (3a).

The only contract between the Petitioner and Respondent was the royalty agreement and it did not contain any provision for liquidated damages should Petitioner's property be lost or damaged, nor did it make any reference to Petitioner's claimed industry valuation standard (3a, 4a).

II. THE PROCEEDINGS BELOW

Although Respondent generally agrees with the Petitioner's outline of the proceedings below, Petitioner's synopsis of the Second Circuit's conclusions warrants correction and clarification. The Second Circuit addressed only two of the points of error raised on appeal by Respondent and having found the jury award excessive, did not comment upon four other points of error. The Second Circuit did not comment upon: (1) whether the industry standard was relevant in the context of the contractual relationship between Petitioner and Respondent; (2) whether industry standard evidence should have been excluded as being likely to confuse the issues and mislead the jury; (3) whether Respondent's proposed jury instruction, advising the jury not to take the industry standard into consideration, should have been given; or (4) whether Respondent's right to cross-examine was improperly restricted. Petitioner's implication that these points of error were specifically rejected by the Second Circuit is erroneous.

ERRONEOUS COMMENTS IN PETITIONER'S BRIEF

At page 3 of his brief, Petitioner claims the Circuit Court "found that there were no trial errors, and rejected the argument that the jury acted out of any passion or prejudice, . . .". However, the only finding by the Circuit Court with regard to trial errors raised by Respondent was that the denial of Respondent's Motion *In Limine* was not in error and that the verdict was excessive (4a, 5a). Having found the jury's verdict unsupported by the evidence and manifestly excessive, the Circuit Court neither specifically ruled on nor rejected any of the other grounds for reversal raised by Respondent.

At page 4 of his brief, Petitioner stated: "The testimony supporting Gasperini's case was largely uncontroverted". To the contrary, although not reflected in the Circuit Court's opinion, the testimony at trial established that the missing 300 slides came from over 4,500 pictures taken by Petitioner in

Central America, and that duplicates of approximately 100 of the 300 missing slides were available. In addition, testimony submitted by Respondent provided the basis for the Circuit Court's finding that with the exception of 50 of the missing slides, the lost slides lacked uniqueness and "depicted either generic scenes or events at which other photographers were present" (9a).

At page 5 of his brief, Petitioner stated "expert testimony established that . . . the average value of Gasperini's photographs was $1,500 each". Not only did the Circuit Court find Petitioner's expert's method of valuation contrary to New York law and unsupported by the evidence (6a), Respondent presented expert valuation testimony of much lower value, testimony strikingly similar to the Circuit Court's evaluation and within the outer bounds of a reasonable award (9a).

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT CORRECTLY HELD THAT THE JURY'S VERDICT WAS EXCESSIVE

In an effort to obtain review, Petitioner has mischaracterized the process used by the Second Circuit in finding that the jury's verdict was so excessive as to mandate a new trial. Contrary to Petitioner's assertions, the Second Circuit followed accepted procedures for review in diversity cases and found that the jury's verdict resulted in an award which "cannot be regarded as anything but a financial windfall for Gasperini" (6a). In effect, the Second Circuit viewed the jury award as being akin to "a winning lottery ticket" (6a).

The use of the terms winning lottery ticket and financial windfall clearly indicate that the Second Circuit was shocked by the size of the jury's verdict, especially in view of the lack of evidence sufficient to sustain it (5a). This is readily understandable when a jury awards four and a half times what the

Circuit Court found to be the "outer bounds" of reasonable compensation (9a).

In reaching its conclusion, the Second Circuit used the methodology accepted by Circuit Courts to determine whether a jury award should be overturned as excessive. It compared the verdict with other cases involving similar injuries in the state whose substantive law governs the rights of the parties. *Martell v. Boardwalk Enterprises, Inc.*, 748 F.2d 740, 750 (2nd Cir. 1984); *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 921 (5th Cir., 1987), cert. denied, sub. nom. *Rachelle Laboratories, Inc. v. Osburn*, 485 U.S. 1009, 108 S.Ct. 1476 (1988); *Ferren v. Richards Mfg. Co.*, 733 F.2d 526, 531 (8th Cir. 1984). Recognizing that the sky is not the limit for jury verdicts, even those that have been once reviewed, *Seidman v. American Airlines, Inc.*, 923 F.2d 1134, 1141 (5th Cir. 1991), the Second Circuit looked at cases in the recent past in New York that have properly applied New York damages law in order to find the greatest amount that New York courts have awarded for similar injuries. *Id.* at 1141 (7a). Having done so, and having found a clear pattern in New York appellate decisions addressing award of damages for lost transparencies (7a), the Second Circuit found the award to Mr. Gasperini to be a financial windfall (6a), unsupportable by the evidence and excessive.

The Second Circuit followed accepted federal law in its analysis of the excessiveness issue. It reviewed relevant state case law on excessive awards, *Trevino v. United States*, 804 F.2d 1512, 1515 (9th Cir. 1986), *cert. denied*, 484 U.S. 816, 108 S.Ct. 70 (1987) and found the jury's award manifestly excessive. In so doing, it did not deviate from the basic tenets of Federal court appellate review of jury verdicts.

II. APPELLATE REVIEW OF JURY VERDICTS FOR EXCESSIVENESS IS PROPER AND NECESSARY

Petitioner correctly acknowledges that the Circuit Court of Appeals uniformly review jury verdicts for excessiveness and that this Court has not indicated that the Circuit Courts are acting without Constitutional authority. Petitioner, however, fails to accept the fact that appellate review of jury verdicts is not only proper, it is a necessity.

This Court, in *Honda Motor Co., Ltd. v. Oberg*, __ U.S. __, 114 S. Ct. 2331 (1994) recognized that modern practice in the Federal courts and virtually every state permits judges to review the size of damage awards, *Id.* at 2338, a practice which comports with common law precedent. Petitioner fails to note that such review is necessitated by the increasing proclivity of juries to award excessive damage amounts. Appellate review for excessiveness is needed in order to ensure that jury awards are "evenhanded, fair, and predictable". *Consorti v. Armstrong World Industries, Inc.*, 65 F.3d 781, (2nd. Cir. 1995) and do not impose unpredictable high costs on society. *Id.* at 787. Recognizing that the sky is not the limit for jury verdicts, *Seidman v. American Airlines, Inc.*, *supra* at 1141, Circuit Courts review jury verdicts to ensure that they are "within the universe of possible awards supported by the evidence", *Clark v. Taylor*, 710 F.2d 4, 13 (1st Cir., 1983) and are not "beyond the maximum damages that a jury reasonably could find to be compensatory for a party's loss", *Green v. Francis*, 705 F.2d 846, 850 (6th Cir. 1983).

The need for evenhanded, fair and predictable jury awards is particularly germane in a commercial context, such as here. Here, a valuation standard mandating that any award of damages be based upon specific criteria was ignored by the jury and a windfall award of $450,000 was given to a person with no demonstrated earning power from photography. The jury award was not evenhanded, fair or in accordance with the standard established by New York courts to ensure predictability. Nor was it within the universe of possible awards

supported by the evidence. The Second Circuit Court of Appeals recognized this and in keeping with their inherent powers and duties, held the unfounded award to be so excessive as to warrant vacating and ordered a new trial. Petitioner has not seriously disputed the Second Circuit's factual finding and has not provided a basis for overturning it. The Second Circuit's granting of a new trial preserves Petitioner's Seventh Amendment right to trial by jury. *Marchant v. Dayton Tire & Rubber Co.*, 836 F.2d 695, 704 (1st Cir. 1988).

III. JUSTICE WAS SERVED BY THE DECISION BELOW AND THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR CONSIDERATION OF THE ISSUES RAISED BY PETITIONER

Leaving aside the frightening contention that the Seventh Amendment bars any review of jury verdicts by appellate courts, if Petitioner has in fact identified an issue worthy of this Court's consideration, this is not the case in which to consider it. No matter how the standard of review of damages verdicts is articulated, or what body of law that standard is taken from, it is impossible to avoid the conclusion that there was something seriously wrong with the jury's verdict in this case. Thus, the issues raised by Petitioner amount to pure semantics.

Petitioner attempts to portray in stark terms the disparity between the New York State "deviates materially" standard of review and the "shock the conscience" standard followed by some federal courts and seeks to elevate that disparity to constitutional heights, pp. 8-9, but the entire exercise is long on rhetoric and short on reality. The differences between those standards simply don't exist in any practical sense, especially in a commercial case such as this. Even the lower federal courts have articulated the standard of review of damages awards in divergent ways, many of which resemble the New York standard. Indeed, there are almost as many statements of the federal standard of review as there are judicial circuits.

See Multi-Channel TV Cable Company v. Charlottesville Quality Cable Corporation, 65 F.3d 1113, 1125 (4th Cir. 1995) (damages award cannot be set aside unless it is "against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice."); *Hogan v. Bangor and Aroostook R.R. Co.*, 61 F.3d 1034, 1037 (5th Cir. 1995) ("An award of compensatory damages is excessive if it exceeds a rational appraisal of the damages actually incurred."); *Trytko v. Hubbell, Inc.*, 28 F.3d 715, 727 (7th Cir. 1995) (jury award can be disturbed only if it is "monstrously excessive, the product of passion or prejudice, or if there is no rational connection between the award and the evidence"); *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994) (amount of damages awarded by fact finder must stand unless there is an error of law or "the amount is clearly erroneous or so gross or inadequate as to be contrary to right reason."); *Meyers v. Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994) (damages award by trial court will not be overturned unless "it manifests plain injustice, or is so grossly excessive as to be clearly erroneous."); *Velazquez v. Figueroa-Gomez*, 996 F.2d 425, 428 (1st Cir.), *cert. denied*, __ U.S. __, 114 S. Ct. 553 (1993) (award must stand unless it is "grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand."); *Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1580 (Fed. Cir. 1992) (jury's finding must be upheld unless amount is "grossly excessive or monstrous, clearly not supported by the evidence, or based only on speculation or guesswork.") (citing *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1360 (9th Cir.), *cert. denied*, 484 U.S. 826 (1987)); *Neyer v. United States*, 845 F.2d 641, 645 (6th Cir. 1988) (a reduction in damages award may be justified even if it does not "shock the conscience, but rather leaves us with the definite and firm conviction that a mistake has been committed resulting in plain injustice."); *Cunningham v. Overland*, 804 F.2d 1066, 1069 (8th Cir. 1986) (appellate court should review damages

award "when the amount creates plain injustice or a monstrous or shocking result.").

However, the diversity of opinion on how the standard of review should be translated into words is not a call to arms for this Court, because there is a common thread running through the phraseology used by all of the Court of the Appeals; they all strive to defer to the jury's subjective appraisals of value, while remaining vigilant to prevent injustice, by ensuring that verdicts find support in the evidence. No intervention by this Court is necessary to ensure this common endeavor.

The common endeavor is exactly what the Second Circuit pursued. The opinion below makes it quite evident that the panel was shocked to contemplate that a small business which accidently lost some slides could be flattened by a judgment of $450,000, plus interest, in favor of a news reporter who had no demonstrated plans for the slides and whose peak annual earnings from photography were less than $4,000. The Circuit Court repeatedly indicated that it found the verdict bereft of record support. For example it held:

> New York law, in setting damages for lost transparencies, requires a consideration of (1) the uniqueness of the transparencies and (2) the earning level of the photographer. And Gasperini failed to make a showing on either point sufficient to sustain the jury's verdict.

(5a) (citations omitted).

Perhaps the most critical point below was that "no reasonable jury could have concluded, as the jury in this case did, that each of the lost three hundred transparencies was equally, and significantly, original." (5a). It is obviously no mathematical coincidence that the verdict below is equal to the 300 lost slides multiplied by the $1,500 "industry standard" that the plaintiff repeated *ad nauseam* in front of the jury. There can be no doubt that the verdict was the product of

a jury that was less interested in reviewing the evidence than in quickly getting home.

Notwithstanding petitioner's implication to the contrary, the Circuit Court never suggested that it would reach a different result had it applied a "shock the conscience" standard. Indeed, when a jury ignores evidence (or lack thereof) as it did here, a court's conscience *should* be shocked.[1]

Thus, if this court has any desire to examine the issues raised by the Petitioner, Respondent respectfully submits that there are much better vehicles for considering them. Justice was served in this case when the Circuit Court rendered its opinion.

---

[1] One reason why this can be more easily said here is that this is not a personal injury case. It is much harder for a court to justify the assertion that its conscience is shocked by a personal injury or wrongful death verdict, considering the subjective nature of the analysis. By contrast, the valuation of personal property is much more of an exercise in dry mathematics. In these circumstances, it is much easier to determine when the jury has ignored evidence and victimized a party, and thus much easier for an appellate court to find its conscience shocked by the verdict.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully Submitted,

FRANCIS A. MONTBACH
Counsel of Record
BIGHAM ENGLAR JONES
& HOUSTON
Attorneys for Respondent
14 Wall Street
New York, New York 10005
(212) 732-4646

Of Counsel

DAVID L. FIOL
KREINDLER & KREINDLER
100 Park Avenue
New York, New York 10017
(212) 687-8181